In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 354.....

RAY RITTER, *et al.*,
Petitioners,

vs.

MILK AND ICE CREAM DRIVER AND DAIRY EMPLOYEES UNION, Local 336, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO, BRIEF IN SUPPORT OF PETITION and MOTION TO DISPENSE WITH PRINTING AND SERVICE OF PORTIONS OF RECORD.

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THE GONG LEGAL PUBLICATION CO., CLEVELAND, OHIO.

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MILK AND ICE CREAM DRIVER
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Local 336, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

Your petitioners respectfully pray for a writ of certiorari to review the decision of the Supreme Court of Ohio in the above case.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The petitioners seek a review of the judgment of the Supreme Court of Ohio which dismissed their petition permanently to restrain the Milk and Ice Cream Drivers Union, Local 336, A. F. L., and approximately 150 dairy owners in Cleveland from carrying into effect an agreement and combination to deprive them of their supply of bottled milk for resale. The action was brought in the Common Pleas Court by approximately 50 of 300 independent milk dealers in Cleveland, Ohio, called "brokers," under

the Valentine Anti-Trust Act of G. C. O. 6390-1-3, *et seq.* and was based on an alleged conspiracy of the defendants to restrain trade unlawfully, create a monopoly in the marketing of milk in Cleveland, to fix prices and destroy petitioners' business in violation of law.

Upon dismissal, appeal was had, *de novo,* to the Court of Appeals for the Eighth District of Ohio, where new and additional evidence was introduced but injunction denied. The appeal from this decision was denied by the Supreme Court of Ohio, and the motion to certify overruled.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 344 (b), Section 237-(b) of the Judicial Code as amended by the Act of February 13, 1925 and March 8, 1939. Judgment of the Supreme Court dismissing the petition of the appellants as of right was entered May 1, 1940, two Justices not concurring. The application for rehearing was denied on May 22, 1940.

THE QUESTIONS PRESENTED.

1. This case presents the question whether the provisions of the Ohio Valentine Anti-Trust Act, Sections 6390 *et seq.,* as construed and applied by the Court below, whereby the petitioners were excluded from protection against a combination formed to restrain trade, create a monopoly and destroy their business of buying and selling milk for profit, violated the due process or equal protection clauses of the 14th Amendment.

2. This case presents the further question whether the combination among the defendants to deprive the petitioners of their supply of bottled milk was an interference with Interstate Commerce in violation of Article I, Section 8 of the United States Constitution.

3. Can independent business men, such as petitioners, who are not employees, be made the basis of a labor dispute between employers and labor unions?

4. Are fixing and maintaining prices, eliminating competition, creating a monopoly and restraining trade in the sale and purchase of milk and dairy products, such incidents of a labor union's relation with employers as to entitle it to enter into an agreement and to combine with them to carry out any or all of said purposes?

5. Is it the "order of the day" for small corner grocery stores, drug stores and individual business men such as petitioners, to be annihilated by "chain stores" as was enunciated by the Court of Appeals and affirmed by the Court below on the theory that it is incidental to a lawful union purpose?

6. Is it within the province of a labor union to cloak an illegal combination to restrain trade in the guise of a claimed labor dispute?

7. Are fixing and maintaining prices, eliminating competition, creating a monopoly and restraining trade in the sale and purchase of milk and dairy products, such incidents of a labor union's relation with employers as to afford it and the employers through it immunity from antitrust laws when it enters into an agreement with them to carry out any or all of said purposes?

STATUTES INVOLVED.

General Code of Ohio Sections 6390-91-93, *et seq.*—Appendix, *infra.*

LEADING FACTS SHOWN BY THE RECORD.

In October, 1937 the milk dealers' union entered into an agreement with approximately 140 dairy owners in Cleveland. Ex. 3 (1-166). There were then in Cleveland about 146 dairies. (R. 536; N. S. 26.)*

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* R.—refers to pages in typewritten Record.
N. S.—refers to Narrative Statement.

By this contract:

1. The union was given the exclusive sale and distribution of all milk and dairy products of each dairy signatory to said contract. (Articles 1, 34, Ex. 3.)

2. No person owning his own truck and route and conducting his own milk business could join the Union. (Article 1, Ex. 3.)

3. The price at which deliverymen were to sell milk was to be 12¢ per quart retail and 10¢ per quart wholesale. This the respondents claim was to become the basis for computing commissions.

The admitted effect of this contract was stated by counsel for the Union and The Telling Belle Vernon Company to be for each dairy owner signatory thereto to cease selling bottled milk to independent owners of trucks, called brokers, who bought bottled milk from dairies and sold it to stores and consumers. (Brief of Court of Appeals, T. B. V.) and (R. 863; N. S. 33.) Because of this, the Union representatives stated the brokers would be eliminated from competition. (R. 563; N. S. 28.) There were in Cleveland in 1937, 2400 members in the Union (R. 566; N. S. 28) and 300 or more brokers. (R. 455, 464; N. S. 19.) (R. 833; N. S. 31.)

Pursuant to this agreement, all dairies having contracts were notified by the Union that after May 1, 1938, brokers were not to be supplied with bottled milk. One dairy supplying approximately 45 to 50 such brokers posted a notice (Pltff. Ex. 1) advising that contracts to supply them with milk would terminate by reason of this agreement. The brokers frantically sought a method of remaining in business but were advised by Union officials that their agreement with the companies was that brokers were to be eliminated (R. 485-6), that there was no way open for them except to sell their equipment, get jobs and

become members of the Union. (R. 486; N. S. 22 and 23.) This required earning a minimum of $140.00 per month by each broker, since under the contract each employer agreed to pay retail drivers a minimum of $140.00 per month. (Ex. 3.)

Not desiring to quit business in which many had engaged long before the Union came into being in 1933, and the Union being closed to them, the brokers on April 22, 1938, filed suit in the Common Pleas Court of Cuyahoga County, seeking to restrain the defendants from putting into effect this agreement. In their petition the plaintiffs claimed that the Union and the defendant dairies entered into an unlawful combination and conspiracy to create a monopoly, which, unless restrained, would enable them to fix and maintain the price of milk, eliminate competition, restrain trade and destroy the plaintiffs' business by shutting off their supply of bottled milk in violation of the Valentine Anti-Trust Act of Ohio; that unless the defendants were enjoined, they had no adequate remedy at law.

In 1930 the Common Pleas Court of Cuyahoga County restrained the Telling Belle Vernon Company and numerous persons named defendants in this case from carrying into effect an agreement to restrain trade and create a monopoly in Cleveland. *Clover Meadow Creamery Co. v. National Dairies et al.*, 29 O. N. P. N. S. 243. In that case as in our case, a "card" price was involved. In 1933 the milk drivers' union was formed and obtained contracts from dairy owners which continued through September 30, 1937. On September 8, 1937 a committee representing the Union met with a committee representing the dairies to formulate a new agreement. (R. 770; N. S. 117.)

From their inception the discussions leading to the agreement turned to the need of policing the milk industry against price cutting. Although many other subjects were discussed by the two committees, nevertheless, the "problem" of the broker, his influence upon the business and the need for his elimination was thoroughly discussed.

The motive prompting the destruction of the broker's business was stated to be his ability to sell milk at 2¢ less than the large distributors who spent that sum per quart for advertising purposes. (R. 747; N. S. 100.) This was the "evil" which the dairies and Union decided to root out (R. 686; N. S. 55, 56, 107, 108), but feared the anti-trust law. The brokers were selling 30,000 quarts of milk per day. (R. 670; N. S. 44.) During the negotiations the whole question was summarized as follows (R. 756; N. S. 107, 8):

> "Mr. Rohrich: (Union representative) On the other hand, you appreciate the thing we are trying to do.
>
> Mr. Baxter: (Employers' representative) I do. We are in favor of it.
>
> Mr. Gibson: (Employers' representative) You are after more than some items of income for your men. You would like to see the prices leveled, wouldn't you?
>
> Mr. Rohrich: Yes, why not?
>
> Mr. Baxter: (Employers' representative) So would I.
>
> Mr. Rohrich: You would. We want to help you do it. We are trying to find a way to do that without getting into difficulty.
>
> Mr. Seegert: (Milk Dealers Fraternal League representative) I think we are in accord.
>
> Mr. Baxter: I could do that. It would not work very much of a hardship.
>
> Mr. Rohrich: I might just as well answer you by saying, no, we don't give a damn about your industry, we are only interested in our men, but that is not so. We are interested in these things. They are of importance to the industry. It is just like the individual peddler has been in the ice industry, and in the bakery industry on that. You had a lot of it in the milk industry in the old days. You have done away with it now."

Therefore, the Union argued if it were to build up the industry and bind its officers to eliminate price cutting, it wanted something in return (R. 738-9; N. S. 93, 94, 95)

as well as the means in a written contract to accomplish it. (R. 738-9; N. S. 93, 94, 95.)

The Union agreed to assume full responsibility for any charge of price fixing. (R. 754; N. S. 105.) It stated it was trying to make it possible for all competitors in the milk industry to sell milk at twelve cents per quart. Through this medium, all competitors would be compelled to bring their prices up or go out of business. (R. 754.) Drivers could even get 13¢ per quart. (R. 778; N. S. 122.)

The Union secretary pointed out that in the preceding year or two it had "policed" the industry against underselling (R. 764, 5, 6, 7, 8; N. S. 112, 13, 14):

1. By picketing small retail stores with whom it had no controversy but who advertised milk at one cent lower than the delivery price. (The signs came down.)

2. By cutting off the milk supply from such retail stores through dairies it served.

3. By combining with the Fraternal League, an organization of numerous milk dealers in Cleveland, to keep prices fixed.

The activity affected small fruit stores, grocery stores, bakery shops and similar small business men.

Having been helpful in eliminating price cutting in small stores, it was agreed that through a combination of the Union and the Cleveland dairies, underselling by brokers could likewise be controlled (R. 780; N. S. 123) if the Union had a closed shop agreement.

The brokers had to obtain bottled milk or lose their business. (R. 452, 3; N. S. 18.) Therefore, to eliminate them, their supply had to be cut off. That this would tend to create a monopoly in the hands of The Telling Belle Vernon Company and three or four other large dealers was discussed and feared by some members of the committee. (R. 745; N. S. 99.) That it might cause a loss of

employment was likewise suggested. (R. 745; N. S. 99.) The business of the broker would be sought by Telling Belle Vernon and others. (R. 339; N. S. 4.)

Cleveland obtains its milk supply from sources within a radius of one hundred miles of the city. (Statement of Diltz, R. 819, 20; N. S. 13.) A proposal by an individual from Pennsylvania to open a dairy in Cleveland, employ the brokers about to be eliminated and unionize them, brought the assurance from Union officers that no such thing could happen because "that man would have to get milk into Cleveland first." (R. 692; N. S. 59-67.) This, it may be inferred, the Union through its affiliates would not permit. Even a cooperative dairy owned by brokers could not open because they would be prevented from getting milk into Cleveland. (R. 680; N. S. 63, 64.) In this the Fraternal League, representing numerous dairy owners in Cleveland, coincided. (R. 692, 7; N. S. 59-67.)

The Union and the employers agreed that the broker had to be eliminated. They feared putting such provision into the agreement, but counsel for the Union assured them that he could set it up legally. (R. 687; N. S. 56.) The final agreement made no mention of the brokers, but Articles 1 and 34 were so drawn as to make it impossible for them to stay in business.

One hundred twenty dealers, or 75-80% of all dairy owners in Cleveland, approved this agreement at a meeting called for that purpose (R. 370, 1; N. S. 8), and approximately 140 dairies in Cleveland signed such agreements, all identical in terms. (R. 536; N. S. 25) (Ex. 3, 166.) Altogether there were 146 dealers in Cleveland. (R. 536; N. S. 26.)

One dairy owner signed an agreement out of fear that if he did not "the Union would surround the dairy and blow it up." (R. 601-611; N. S. 29.) Some brokers attempted to sell their routes and trucks, but could not do so. (R. 886; N. S. 34, 54.)

Box lunch operators supplying factory workers during lunch hours were advised that they would receive no milk after May 1, 1938. Others, who were in business for years, claimed they would be deprived of the means of earning a livelihood if the contract went into effect. (R. 834-5; N. S. 31, 32.)

JUDGMENT OF THE SUPREME COURT OF OHIO and OPINION OF THE COURT OF APPEALS.

The matter was presented to the Court of Appeals, which held that the elimination of the 300 or more independent milk dealers from competition and the destruction of their business was a mere incident to an otherwise lawful purpose, namely, the creation of a "closed shop." It declared:

> "With the right to insist upon a closed-shop contract, and the right to bargain as to wages, it is doubtful if anyone would challenge the legality of this contract but for the seeming calamity to the Brokers. *Of course, the Brokers may sell their equipment and routes, or they may seek other sources of supply, or join the Union and drive and sell for the Dealers direct.* It should be noted that this contract makes no reference to Brokers. *Their misfortune is a mere incidental consequence, if the contract be otherwise legal.*" (Emphasis ours.)

> "Seldom does a large factory or industry establish a closed shop that there are not some victims strewn along the pathway, victims in the sense that the sphere and opportunities of employment to the non-union man are restricted or extinguished. Unlawful conspiracy cannot and should not be inferred from the fact alone that some brokers are without the Union and dealers negotiated and executed in adjusting their labor relations. *Many a former corner grocery and drug store has been annihilated in the evolu-*

> *tion and growth of the chain stores. It seems to be the order of the day."* (Opinion of Court of Appeals in Record.)

In their brief in the Court of Appeals petitioners asserted their constitutional rights. (Page 5, brief of plaintiffs-appellants in Court of Appeals.)

By assignments of error, 7, 19, 20, 21 in the Supreme Court of Ohio, the petitioners claimed in their appeal as of right that they were denied equal protection of law and due process under the 14th Amendment to the United States Constitution and that there was an interference with Interstate Commerce under Article I, Section 8 of the United States Constitution.

All these questions were argued in the brief of petitioners in the Supreme Court of Ohio and upon oral hearing. On May 1, 1940 the Supreme Court of Ohio ruled as follows:

> "It is ordered and adjudged that said appeal as of right be and the same is hereby dismissed for the reason no debatable constitutional question is involved in said cause."
>
> *Ritter et al. v. Milk & Ice Cream Drivers and Dairy Employees Union et al.*, 136 O. S. 582; Ohio Bar May 13, 1940.

Two of the seven justices failed to concur in this order.

The Motion to Certify was overruled.

The Supreme Court of Ohio rendered no opinion and made no finding of facts.

The Court of Appeals made no finding of facts, but rendered an opinion which may be found in the Record.

REASONS FOR GRANTING THE WRIT.

Proposition 1.

The petitioners contend that the court below has decided a question of law of widespread importance to individuals, independent entrepreneurs and labor unions in a way which is untenable and is probably in conflict with the weight of authority.

Truax v. Corrigan, 257 U. S. 312;
U. S. v. Brims, 272 U. S. 549;
Meadowmoor v. Milk Drivers' Union, 371 Ill. 377;
Lake Valley Farm Products, Inc. v. Milk Wagon Drivers' Union, Local 753, 108 Fed. (2d) 436.

Proposition 2.

In *Meadowmoor v. Milk Drivers' Union, supra,* the Supreme Court of Illinois held directly contrary to the holding by the Supreme Court of Ohio in the instant cause. Until this question is decided by this Court, there will exist substantial confusion among many groups in industry, business and labor in many states as to what is "the order of the day" relating to such matters as are involved herein.

The decision of the court below is in conflict with applicable decisions of this Court:

See United States Supreme Court cases cited in support of Proposition 1, and

Duplex Printing Press Company v. Deering, 254 U. S. 443;
Eastern States Lumber Association v. United States, 234 U. S. 660.

Proposition 3.

The decision of the court below in so construing and applying the provisions of the Valentine Anti-Trust Act, G. C. O., 6390 *et seq.,* as to exclude peti-

tioners from the protection of the Act which condemns a combination and monopoly in illegal restraint of trade, the purpose and effect of which is to deprive the petitioners of their right to do business while affording protection to others in similar circumstances, is arbitrary, unreasonable and deprives the petitioners of due process and equal protection of the laws in contravention of the 14th Amendment to the Constitution of the United States.

Connolly v. Sewer Pipe Co., 184 U. S. 540;
Truax v. Corrigan, 257 U. S. 312;
Smith v. Cahoon, 283 U. S. 567;
Barbier v. Connolly, 113 U. S. 27;
Beidler v. South Carolina Tax Commission, 282 U. S. 1.

Proposition 4.

The decision of the court below in holding that the interference with the sale of milk in the City of Cleveland does not affect Interstate Commerce is in conflict with decisions of this Court.

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197;
Curran v. Wallace, 306 U. S. 1;
U. S. of America v. Rock Royal Cooperative, Inc., 307 U. S. 533;
National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1, 37;
Loewe v. Lawlor, 208 U. S. 274.

Proposition 5.

The decision of the court below is in conflict with numerous decisions of this Court holding that labor unions may not be used as a cloak to shield illegal activities.

See cases in support of Proposition 2, and

U. S. v. Brims, 272 U. S. 549;
Coronado Co. v. United Mine Workers, 268 U. S. 295.

Proposition 6.

This Court has before it two other phases of this controversy:

1. On June 3, 1940 this Court granted certiorari in *Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies,* wherein was involved the conflict in the method of distributing milk by "vendors" and union drivers upon the theory that the decision of the Supreme Court of Illinois deprived the Union of the constitutional right to free speech when it was enjoined from picketing stores supplied by vendors.

2. On April 1, 1940 this Court granted certiorari to the same labor union, where there was involved the conflict in the method of distributing milk between a union and a dairy supplying vendors on the theory that enjoining picketing involved the same clauses of the 14th Amendment.

Milk Wagon Drivers' Union v. Lake Valley Farm Products, No. 20, October Term, 1940.

Our case involves the identical conflict in the method of distributing milk. The vendors "or brokers" are seeking to retain their right to buy and sell bottled milk for profit, and the Union and Cleveland dairy owners wish to deprive them of that right, thus involving their constitutional guarantees to due process and equal protection of the law under the 14th Amendment.

It is respectfully urged that if enjoining the right to picket by a labor union is a violation of the clause of the 14th Amendment relating to free speech, depriving the petitioners of the right to do business and excluding them from the benefits of the anti-trust laws are no less violations of the same amendment relating to equal protection and due process.

THIS COURT HAS JURISDICTION.

The record discloses that the Supreme Court of Ohio considered and decided the Federal question raised by the assignments of error. An order of the Supreme Court of Ohio, dismissing a writ of error from an intermediary Appellate Court on the ground that no debatable constitutional question is involved, is considered to be an affirmance and the order of dismissal is the judgment reviewable in this Court. *Mathew v. Huwe,* 269 U. S. 262; *Van Heufel v. Harkelrode,* 284 U. S. 225; *Titus v. Walleck,* 306 U. S. 282.

The Federal question was necessary to a complete determination of this cause. Without it there could be no decision. The Valentine Act was the basis of the action. The petitioners claimed a violation thereof by respondents by a scheme to deprive them of their business. They claimed protection under the Valentine Anti-Trust Law. Excluding them from the benefits of this Act involved their rights guaranteed them by the 14th Amendment, both as regards equal protection and due process. Definitely, then, the Federal question is so interwoven in the court's decision as to bring it clearly within the jurisdiction of this Court. *Senn v. Tile Layers Union,* 301 U. S. 468.

It may be argued that the court found factually against the petitioners. If so, this would not defeat the jurisdiction of this Court.

State of Indiana v. Brand, 303 U. S. 95, 98;
Virginia v. The Imperial Co., 293 U. S. 15, 16, 17;
Grayson v. Harris, 267 U. S. 352, 358.

It is well settled that this Court will not permit the foreclosure of claimant's constitutional rights because of the State Court's finding of fact, which would preclude jurisdiction. This Court will examine the facts to see whether the evidence adequately sustains the findings.

Davis v. Wechsler, 263 U. S. 22, 24;
Truax v. Corrigan, 257 U. S. 312;

King v. Putnam Investment Co., 248 U. S. 23, 39;
Ward v. Love, 253 U. S. 17, 23.

Thus this Court has said:

> "If the Constitution and Laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right, or to bar the assertion of it even upon local grounds." *Davis v. Weschsler, supra*, 24.

The jurisdiction of this Court to protect constitutional guarantees is "a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the Laws made in pursuance thereof." *Ward v. Love, supra.*

Neither the court below nor the intermediary Appellate Court made a finding of facts in the instant cause, although both courts drew conclusions from facts. This will not defeat the jurisdiction of this Court. This brings our case within the rule that the Supreme Court of the United States will review the facts to ascertain whether the litigant's Federal constitutional rights were violated where the state court makes a general or ultimate conclusion of fact.

Norfolk Ry. Co. v. Connolly, 236 U. S. 587, 590.

Where a conclusion of law as to a federal right and finding of fact are so intermingled as to make it necessary in order to pass upon the federal question to analyze the facts, this Court will do so.

Fiske v. Kansas, 274 U. S. 380, 385, 396;
Beidler v. South Carolina, 273 U. S. 548;
Aetna Life Insurance Co. v. Dunken, 266 U. S. 389;
Kansas City Southern Ry. Co. v. C. H. Albers Commission Co., 223 U. S. 573.

The case at bar further is not subject to the rule of "non-federal ground."

The decision is that the petitioners may be deprived of their means of earning a livelihood as entrepreneurs for several reasons of law, among them that "it is the order of the day." This does not turn upon a question of fact and it involves a very important principle of law. Whether this is so or not is a matter of law and is of interest not only to the litigants at bar, but to the nation as a whole. The Supreme Court of Illinois in the *Meadowmoor* case, *supra,* has held the contrary.

Acme Harvest Co. v. Bukman, 222 U. S. 305, 306.

Even if there existed a non-federal ground, it was not adequate to support the decision of the court below. The adequacy of the non-federal ground is for this Court to determine in order to safeguard the litigant's constitutional guarantees.

Abie State Bank v. Bryan, 282 U. S. 765, 773;
Brood R. Co. v. South Carolina, 281 U. S. 537, 540.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the court below.

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